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No. 05-1286

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2005

THE STATE OF OKLAHOMA,
Petitioner,

v.

DARRIN LYNN PICKENS, MAXIMO LEE SALAZAR,
ROBERT WAYNE LAMBERT,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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Case No. 05-1286

QUESTION PRESENTED

Whether the Oklahoma Court of Criminal Appeals was prohibited under **Atkins v. Virginia**, from modifying the death sentences of three post conviction petitioners after finding sufficient evidence that the petitioners were mentally retarded?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully urge this Court to deny the petition for writ of certiorari to review the opinions granting post conviction relief to the Oklahoma Court of Criminal Appeals entered December 7, 2005. **Pickens v. State**, 126 P.3d 612 (Okla. Crim. App. 2005); **Salazar v. State**, 126 P.3d 625 (Okla. Crim. App. 2005); **Lambert v. State**, 126 P.3d 646 (Okla. Crim. App. 2005).

STATEMENT OF THE CASES

The three respondents involved in this petition for writ of certiorari have been involved in litigation both at the state and federal levels for almost two decades each. Before **Atkins v. Virginia**, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the respondents raised as part of their cases that they were mentally retarded. **See Pickens v. State**, 19 P.3d 866 (Okla. Crim. App. 2001); **Lambert v. State**, 984 P.2d 221 (Okla. Crim. App. 2000); **Salazar v. State**, 973 P.2d 315 (Okla. Crim. App. 1998). Indeed, before **Atkins**, the State did not challenge the assertions the respondents were mentally retarded. **Pickens**, 19 P.3d at 887 n. 15; **Lambert**, 126 P.3d at 659. The State only began challenging whether the respondents were mentally retarded when the successor post conviction applications were filed with the Oklahoma Court of Criminal Appeals raising the issue that their death sentences were invalid under **Atkins**.

Darrin Lynn Pickens:

Mr. Pickens was charged and convicted of first degree murder, feloniously carrying a firearm, and robbery with firearm after former conviction of two or more felonies, in Case No. CRF-90-66, in the District Court of Creek County, Oklahoma, for which he was sentenced to death, ten years imprisonment, and life imprisonment, respectively. On appeal, the Oklahoma Court of Criminal

Appeals found error and reversed and remanded for a new trial. **Pickens v. State**, 885 P.2d 678 (Okla. Crim. App. 1994).

Mr. Pickens was retried and convicted again of murder in the first degree while in the commission of robbery with a dangerous weapon, and feloniously carrying a firearm, for which he was sentenced to death and ten years imprisonment. The convictions and sentences were affirmed on appeal. **Pickens v. State**, 19 P.3d 866 (Okla. Crim. App. 2001), *cert. denied* 536 U.S. 961, 122 S.Ct. 2668, 153 L.Ed.2d 842 (2002). A subsequent application for post conviction relief was denied in an unpublished opinion. **Pickens v. State**, Case No. PCD-2000-285 (Okla. Crim. App. August 20, 2001).

A second application for post conviction relief was filed October 14, 2002, which raised the issue that the death sentence imposed against Mr. Pickens was invalid under **Atkins v. Virginia**.[1] After reviewing a response from the State as directed by the court, the Oklahoma Court of Criminal Appeals ordered a jury trial on the mental retardation issue finding "sufficient evidence to create a question of fact on the issue of mental retardation." **Pickens v. State**, 74 P.3d 601, 604 (Okla. Crim. App. 2003).

The jury trial was conducted February 17-20, 2004. The jury found Mr. Pickens was not mentally retarded. On February 23, 2005, post conviction counsel filed a supplemental brief pursuant the procedures established by the Court of Criminal Appeals. Although the procedures directed the State to file a supplemental brief, one was not filed in Mr. Pickens's case. On December 7, 2005, the Court of Criminal Appeals issued an opinion granting post conviction relief, finding

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[1] Under the Oklahoma statutory scheme for post conviction applications, the State is not required to respond to an application unless ordered by the Court of Criminal Appeals. Okla. Stat. tit. 22, § 1089; Rule 9.7(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Chapter 18 App.

error in Mr. Pickens's mental retardation trial, and modifying his sentence to life imprisonment without parole. **Pickens v. State**, 126 P.3d 612 (Okla. Crim. App. 2005).

Robert Wayne Lambert:

Mr. Lambert was charged and convicted of two counts of first degree murder, kidnaping, robbery with firearms, larceny of automobile and one count of third-degree arson, in Case No. CRF-87-240, District Court of Creek County. He was sentenced to death for the murder counts, ten years imprisonment for the kidnaping counts, one hundred years imprisonment for the robbery counts, twenty years imprisonment for the larceny counts, and fifteen years imprisonment for the third degree arson. On appeal, the convictions and sentences for the kidnaping, robbery, larceny, and arson were affirmed. The murder convictions were reversed and remanded for new trial. **Lambert v. State**, 888 P.2d 494 (Okla. Crim. App. 1994).

Mr. Lambert was retried for the murder convictions for which he was again sentenced to death. The convictions and sentences were affirmed on direct appeal. **Lambert v. State**, 984 P.2d 221 (Okla. Crim. App. 1999), *cert. denied* 528 U.S. 1087, 120 S.C.t 816, 145 L.Ed.2d 687 (2000). The subsequent application for post conviction relief was denied in an unpublished opinion. **Lambert v. State**, Case No. PCD-1998-1190 (Okla. Crim. App. February 10, 2000).

Mr. Lambert then invoked the jurisdiction of the United States District Court for the Northern District of Oklahoma by requesting the appointment of counsel to perfect a petition for writ of habeas corpus. **Lambert v. Gibson**, Case No. CIV-2000-313 (N.D. Okla). Habeas counsel was appointed and the habeas petition is currently pending in the district court.

A successor application for post conviction relief was filed October 31, 2002, which raised the issue that the death sentences imposed against Mr. Lambert were invalid under **Atkins v.**

Virginia. After reviewing a response from the State as directed by the court, the Oklahoma Court of Criminal Appeals ordered a jury trial on the mental retardation issue finding "sufficient evidence to create a question of fact on the issue of mental retardation." Lambert v. State, 71 P.3d 30, 31 (Okla. Crim. App. 2003). The court also established the procedures by which the post conviction mental retardation trials would be conducted.

The mental retardation jury trial was conducted May 3 to 21, 2004. The jury found Mr. Lambert was not mentally retarded. On November 5, 2004, post conviction counsel filed a supplemental brief on behalf of Mr. Lambert pursuant the procedures established by the court. Although the procedures directed the State to file a supplemental brief, one was not filed in Mr. Lambert's case. On December 7, 2005, the Court of Criminal Appeals issued an opinion granting post conviction relief, finding error in Mr. Lambert's mental retardation trial, and modifying his sentences to life imprisonment without parole. Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005).

Maximo Lee Salazar:

Mr. Salazar was charged and convicted of first degree murder and first degree burglary, for which he was sentenced to death and ten years imprisonment, respectively, in Case No. CRF-87-460, District Court of Comanche County, Oklahoma. On appeal, the Oklahoma Court of Criminal Appeals affirmed the convictions and sentence for the burglary, but vacated the death sentence and remanded for resentencing. Salazar v. State, 852 P.2d 729 (Okla. Crim. App. 1993). At the resentencing trial, Mr. Salazar was again sentenced to death. On appeal from that death sentence, the Court of Criminal Appeals again vacated the death sentence and remanded for resentencing. Salazar v. State, 919 P.2d 1120 (Okla. Crim. App. 1996). At the resentencing trial, Mr. Salazar was

again sentenced to death. This time, the Court of Criminal Appeals affirmed the death sentence. **Salazar v. State**, 973 P.2d 315 (Okla Crim. App. 1998). A subsequent application for post conviction relief was denied in an unpublished opinion. **Salazar v. State**, Case No. PCD-1998-633 (Okla. Crim. App. August 20, 1999).

Mr. Salazar invoked the jurisdiction of the United States District Court for the Western District of Oklahoma by requesting the appointing of habeas counsel to perfect a petition for writ of habeas corpus. **Salazar v. Gibson**, Case No. CIV-1999-1749-L. Habeas counsel was appointed and filed a petition for writ of habeas corpus which was denied February 7, 2002, in an unpublished opinion. An appeal is pending at the Tenth Circuit Court of Appeals, which had been held in abeyance. **Salazar v. Gibson**, Case No. 02-6094.

On November 4, 2002, a successor application for post conviction relief was filed which raised the issue that the death sentence imposed against Mr. Salazar was invalid under **Atkins v. Virginia**. On December 19, 2002, the Court of Criminal Appeals granted the request for an evidentiary hearing on the issue. After reviewing the record from the evidentiary hearing, the Court of Criminal Appeals found sufficient evidence to create a question of fact to warrant a jury trial on the issue of whether Mr. Salazar is mentally retarded. The jury trial was conducted September 2-5, 2003. The jury found Mr. Salazar not mentally retarded.

Mr. Salazar's mental retardation trial was the first one that was conducted in Oklahoma. Because of confusion over procedures for appealing the jury verdicts, the Court of Criminal Appeals established uniform procedures in **Salazar v. State**, 84 P.3d 764 (Okla. Crim. App. 2004). Post conviction counsel filed the supplemental brief on behalf of Mr. Salazar February 18, 2004. The State filed its supplemental brief the same day, as per the procedures established by the court.

On June 4, 2004, the Court of Criminal Appeals remanded the case to the District Court of Comanche County for an evidentiary hearing on newly discovered evidence and ineffective assistance of counsel. After reviewing the record from the evidentiary hearing, on December 7, 2005, the Court of Criminal Appeals issued an opinion granting post conviction relief, finding error in Mr. Salazar's mental retardation trial, and modifying his sentence to life imprisonment without parole. Salazar v. State, 126 P.3d 625 (Okla. Crim. App. 2005).

REASONS FOR DENYING THE WRIT

THE QUESTION PRESENTED BY PETITIONER DOES NOT RAISE AN ISSUE WHICH CONSTITUTES A COMPELLING REASON FOR GRANTING REVIEW.

In the petition for writ of certiorari, the State of Oklahoma complains that the Oklahoma Court of Criminal Appeals did not have the authority to modify the death sentences imposed against respondents to life imprisonment without parole. Rule 10 of the Supreme Court Rules states "[a] petition for a writ of certiorari will be granted only for compelling reasons." The decisions of the Oklahoma Court of Criminal Appeals did not conflict with any decisions of this Court, of another state court or a Court of Appeals, and did not decide an important federal question that needs to be settled by this Court.

The Oklahoma Court of Criminal Appeals has the inherit and statutory authority to grant the relief it deems appropriate in every case in which it has jurisdiction. Okla. Stat. tit. 20, § 3001.1 states:

> No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, *unless is it the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.*

(Emphasis added) In Salazar, 126 P.3d at 634, the Oklahoma Court of Criminal Appeals invoked

its jurisdiction under § 3001.1 to modify the sentence to life imprisonment without parole. While **Pickens** and **Lambert**, did not specifically cite the same statute, the authority to modify was still inherit in the cases. **See Valdez v. State**, 46 P.3d 703, 711 (Okla. Crim. App. 2002). Because the Oklahoma court has the authority and jurisdiction to grant the relief based upon state law, this Court must deny the petition for writ of certiorari. **See Kunkle v. Texas**, – U.S. –, 125 S. Ct. 2898, 160 L.Ed.2d 605 (2004) (Stevens, J., concurring opinion).

THE DECISIONS OF THE OKLAHOMA COURT OF CRIMINAL APPEALS ARE CONSISTENT WITH THE COURT'S RULING IN ATKINS v. VIRGINIA, PROHIBITING THE EXECUTION OF THE MENTALLY RETARDED.

When this Court issued the **Atkins v. Virginia**, decision, Oklahoma was one of the few remaining states that did not have a statute prohibiting the execution of the mentally retarded. It was only recently, when the Governor of Oklahoma signed legislation that the State of Oklahoma enacted legislation prohibiting the execution of the mentally retarded. In the preceding four years, the Oklahoma Court of Criminal Appeals was left with the responsibility to establish procedures by which the mental retardation issue would be litigated in Oklahoma, especially in the cases that had been through the state appellate process previously. The cases of the three respondents, Darrin Pickens, Maximo Salazar, and Robert Lambert, are strong examples of how necessary such a procedure was in Oklahoma.

In **Murphy v. State**, 54 P.3d 556 (Okla. Crim. App. 2002), the Oklahoma Court of Criminal Appeals established a legal definition for mental retardation and procedures to be utilized in capital cases for determining whether a death sentence was valid. At the time, there were about a dozen capital cases, including Pickens, Salazar, and Lambert, that had been identified as having a colorable claim under **Atkins v. Virginia** that needed successor applications for post conviction relief filed.

Because the Oklahoma legislature and the Governor had failed to enact legislation, the Oklahoma court had to taken action in order to address this important issue. The court issued opinions establishing the procedures that would be utilized in these cases, including remands for jury trials on the sole issue of mental retardation. **See Lambert v. State**, 71 P.3d 30 (Okla. Crim. App. 2003); **Pickens v. State**, 74 P.3d 601 (Okla. Crim. App. 2003); **Martinez v. State**, 80 P.3d 142 (Okla. Crim. App. 2003); **Salazar v. State**, 84 P.3d 764 (Okla. Crim. App. 2004) (establishing review procedures); **Snow v. State**, 87 P.3d 626 (Okla. Crim. App. 2004); **Hammon v. State**, 88 P.3d 891 (Okla. Crim. App. 2004). The Oklahoma court has also established procedures for litigating the mental retardation issue at the pre-trial level. **See State ex. rel. Lane v. Bass**, 87 P.3d 629 (Okla. Crim. App. 2004); **Blonner v. State**, 127 P.3d 1135 (Okla. Crim. App. 2006). In these cases, the Oklahoma Court of Criminal Appeals determined that an I.Q. score of 70 or below was a threshold requirement to proceed further with the issue.

The State requests this Court grant review because the Oklahoma Court of Criminal Appeals has adopted "bright-line rules" which are over inclusive and do not comport to the clinical definitions of mental retardation. Petition at 9. While the State acknowledges errors did occur at the trials for Pickens, Salazar, and Lambert, the State takes issue with the Oklahoma court's decision to modify the sentences rather than remand for another mental retardation trial. Petition at 17. The State argues because the facts of the cases of the respondents are different than those facts articulated in **Atkins**, the Oklahoma court was without authority to modify the sentences. These reasons articulated by the State are not valid and sound reasons for this Court to see fit to grant review. As the Oklahoma Court of Criminal Appeals held in **Lambert**,

> This case is . . . an anomaly in our system. Lambert has raised the issue of mental retardation since 1994. Since then, the State has had ample opportunity to contest

> Lambert's claim that he is mentally retarded. Before 2002, the State chose not to do so. Instead, the State accepted his claim and argued that Lambert's mental retardation was a factor in aggravation supporting a death sentence. Only after *Atkins*, when a mentally retarded defendant can no longer face execution, has the State chosen to contest this issue. In doing so, the State attempted to discredit 21 years of IQ testing, including the test give by its own expert, all of which found Lambert was mildly mentally retarded. The State largely failed to address Lambert's claims of deficits in adaptive functioning in specific areas over the years. Instead, the State relied almost exclusively on evidence of Lambert's past criminal activity, arguing that he was not mentally retarded but had chosen a life of crime. These choices do not suggest an attempt to comply with either the spirit or letter of the law prohibiting the execution of the mentally retarded. Given the totality of the circumstances of this case, we now enforce that law.

Lambert, 126 P.3d at 659. The granting of relief by modifying the death sentences to life without parole was consistent with the Oklahoma Court of Criminal Appeals' statutory and inherit authority as the highest court in the state for review of criminal cases. Okla. Stat. tit. 20, § 3001.1.

The State's assertion that the Oklahoma court has created impermissible over-inclusive "bright-line" rules is without merit.[2] The legal definition established by the court in **Murphy** and applied by the court in the subsequent cases is consistent with the clinical definition for mental retardation, although in some respects more limiting. Contrary to the State's assertion, the clinical definitions as found in the DSM-IV-TR, and developed by the A.A.M.R. do not dictate that evidence of a single I.Q. score above 75 negates a diagnosis of mental retardation when there are valid I.Q. scores in the range of two standard deviations below the mean. The psychologists who testified at the trials, both for the defense and the State, all agreed that I.Q. scores of 70-75 or below are adequate to establish that the defendant had significantly sub-average intellectual functioning.

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[2] In fact, the Oklahoma Court of Criminal Appeals recently denied relief to two post conviction petitioners raising the mental retardation claim. **Hooks v. State**, 126 P.3d 636 (Okla. Crim. App. 2005), *cert. denied* -- U.S. --, 126 S. Ct. 1790, – L.Ed.2d – (2006); **Myers v. State**, 130 P.3d 262 (Okla. Crim. App. 2005), *cert. denied* – U.S. –, 126 S. Ct. 1788, – L.Ed.2d – (2006).

The fact there may have been one or two scores above that number does not necessarily disprove that prong of the test.

The State claims the Oklahoma court created another over inclusive "bright-line" rule by finding deficits in adaptive functioning based on "historical, as opposed to present, limitations in adaptive functioning." Petition at 18. By far, the most challenging aspect of these cases was proving deficits in two areas of adaptive functioning. The concept of adaptive functioning is how a person behaves in everyday life, not in a structured environment like a prison setting. Because the respondents have all been incarcerated for several years, providing relevant evidence in these areas for both the State and respondents was difficult. Lambert MR Tr. at 1423. As an example, the State claims the Court of Criminal Appeals citation to evidence that Pickens could not tie his shoes until he was nine years old was not relevant to a finding of a present deficit in adaptive functioning. The State asserts that Mr. Pickens "currently wears his shoes on the correct feet and has done consistently since the age of nine." Petition at 18-19. But the court did not imply that Mr. Pickens still wears his shoes on the wrong feet. Further, there was no evidence presented at trial that Mr. Pickens indeed wears his shoes on the correct feet. This complaint by the State is irrelevant to the question. And the fact Mr. Pickens refused to submit to further psychological testing does not equate to "a calculated decision." Petition at 17.

The State asserts that before a finding of deficits in adaptive functioning can be found, there must be a nexus between the significantly sub-average intellectual functioning and the area of adaptive behavior. This argument was never made by the State in the cases below. Contrary to the assertion by the State, there is no clinical requirement of a "nexus". As the DSM-IV-TR states

> Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community

setting.

DSM-IV-TR at 42. The Oklahoma court did consider the totality of the evidence when determining whether there was sufficient evidence of deficits in adaptive functioning.

In addition, the State argues the sentences should not have been modified because of the criminal activity of the respondents. Petition at 23-24. While evidence of criminal activity of the respondents may be relevant to explain who they are, this information is not dispositive of the question whether that person's cognitive functioning prohibits his execution. For as the Court acknowledged in **Atkins**, mentally retarded people can commit crimes. The State's expert also admitted the same at the mental retardation trials. See Pickens, MR Tr. at 625. In **Lambert**, 71 P.3d 30, the Court of Criminal Appeals acknowledged the facts of the underlying crimes were irrelevant to the issue of whether the person was mentally retarded. The State repeatedly attempted at the trials and in this petition, to divert the attention of those reviewing these cases from the facts of the mental retardation. This is nothing but red herring.

CONCLUSION

The State argues in the petition that neither this Court's decision in **Atkins v. Virginia**, nor the Eighth Amendment required the Oklahoma Court of Criminal Appeals to modify the sentences to life imprisonment without parole. The ruling of the Oklahoma court was not contrary to the **Atkins** decision, rather it upheld the spirit of the ruling. The State makes reference to some of the evidence presented at the mental retardation trials, but fails to articulate the depth of the evidence presented for the respondents. These facts are detailed sufficiently in the decisions of the Court of Criminal Appeals, therefore, not repeated in this brief. The evidence presented in the three trials was

sufficient to support the Oklahoma Court of Criminal Appeals's conclusions that the respondents had met their burden of prove, despite the findings of the juries. Several errors occurred in each of the trials that warranted relief. The fact the Oklahoma court chose to modify the decisions rather than remand for further proceedings, demonstrated the necessity for finality in these cases after years of litigation. This Court should deny the petition for writ of certiorari. If the Court should grant the petition, the respondents urge the Court to affirm the findings of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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THE STATE OF OKLAHOMA,
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DARRIN LYNN PICKENS, MAXIMO LEE SALAZAR,
ROBERT WAYNE LAMBERT,
Respondents.

CERTIFICATE OF SERVICE

I certify that on June 22, 2006, I mailed the original and sufficient copies of the Brief in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* to the Clerk of the Supreme Court with sufficient first class postage. I also mailed by first class mail a true and correct copy of the Brief in Opposition to Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* to the Attorney General of Oklahoma, State Capitol Building, Room 112, Oklahoma City, Oklahoma 73102, by first class postage.

Respectfully submitted,

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June 22, 2006

Marisa Ann Bruner
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William K. Suter
United States Supreme Court Clerk
One First Street, N.E.
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Re: State of Oklahoma v. Pickens, et. al., No. 05-1286

Dear Mr. Suter:

Enclosed please find an original and fourteen copies of a Brief in Opposition to Petition for Writ of Certiorari, Motion to Proceed Informa Pauperis and Affidavit of Petitioner, and Certificate of Service. Please file the same and return the extra copies in the enclosed self addressed stamped envelope. Should you have any questions please do not hesitate to contact me. Thank you in advance for your attention to this matter.

Sincerely,

Marisa Ann Bruner
for Vicki Ruth Adams Werneke
Attorney at Law

Enclosures

RECEIVED
JUN 28 2006
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